Legislative Ethics Board

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COMPLAINT 2019 – NO. 8

In re Santos

February 7th, 2020

REASONABLE CAUSE DETERMINATION AND DISMISSAL OF COMPLAINT

I. NATURE OF THE COMPLAINT

This complaint alleges that Respondent violated the Ethics in Public Service Act (Act) (RCW 42.52.070 and RCW 42.52.160) by communicating with Complainant in a derogatory fashion, disparaging his skills and abilities, mentioning his disability in a demeaning manner and requiring that he consistently remain in the office late during session, contrary to an established workplan of which Respondent was aware.

II. JURISDICTION

The Board has personal and subject matter jurisdiction over this complaint. RCW 42.52.320

III. PROCEDURAL HISTORY

Board counsel received the complaint on September 9, 2019. The complaint was discussed by the Board at regularly scheduled meetings on October 14, 2019, December 2, 2019 and January 27, 2020.

IV. FINDINGS OF FACT

There is reasonable cause to believe the following are the pertinent facts of the case:

1. Respondent is a member of the House of Representatives representing the 37th Legislative District. She has represented this district for more than 20 years.

2. Complainant was Respondent's Legislative Assistant (LA) from November 2018 until June 2019.

3. In 2018, before the Complainant was hired, the House administration placed Respondent on a workplan designed to significantly curtail many of the more onerous office

processes Respondent required her LA to perform as well as cap the number of hours Respondent's LA would work.

4. Respondent believed she was required to follow the workplan, and believed she did follow it, although she never consulted the workplan to ensure that she was in compliance.

5. When Complainant received his LA training, he was informed that there was a workplan in place for that office that restricted his work hours and defined the types of files and notebooks he was to create for Respondent. He was not given a copy of the workplan and was therefore not able to determine whether Respondent was complying with it.

6. Complainant worked long hours during session – more than the workplan allowed. This fact was supported by both Nathan Frowley and John Hunt, LAs whose desks were near Complainant's desk.

7. In addition, Complainant carpooled regularly with his mother who stated that he worked later than 6:30 almost every night. Mr. Hunt, Mr. Frowley and Complainant's mother all reported consistently seeing Complainant work in excess of 50 hours per week during session contrary to the workplan. Respondent's recollection was that Complainant left on time most nights.

8. The workplan specifically excluded several processes that Respondent used to require her former LAs to follow that Respondent nevertheless continued to require Complainant to do. Much of the work Complainant did for Respondent was duplicative in nature.

9. Complainant perceived that Respondent frequently criticized his work performance and communicated her displeasure in ways he found demeaning.

10. Complainant perceived some emails as demeaning and several other witnesses agreed that Respondent's wording, tone and length of emails could make an LA feel humiliated.

11. While Respondent did not yell, swear or use specifically derogatory words, Respondent often conveyed through sharp wording and mannerisms that she was displeased. Complainant and several other witnesses said Respondent could be very intimidating, unyielding, and insistent that her highly process-oriented work style was the best way to do things.

12. Conversely, two former LAs and a former caucus staffer who had worked with Respondent for several years, stated that they enjoyed working for her. They acknowledged that she was very exacting and process-oriented, and that she demanded very high-quality work from herself and others. But they said they never felt personally criticized by Respondent. To the contrary, they appreciated that she was very clear and direct in her communications. They also described feeling appreciated by Respondent because she could be generous with praise when she was pleased.

13. Before Complainant began working for Respondent, he was officially diagnosed with a disability and prescribed medication.

14. At some point early in the 2019 session, Respondent learned that Complainant had been diagnosed with a disability and the nature of that disability. After that discovery, Respondent told Complainant "our working relationship will be difficult given that I'm pretty sure I have [a disability] and with [your disability] this will be challenging."

15. Respondent confirmed that she said something to that effect, and by referring to her disability, she meant that she tended to be very exacting, precise and unyielding in her desire to have things organized in specific ways. The record shows that Respondent revealed the nature of Complainant's disability to the House LA Supervisor, Bernard Dean, Chief Clerk of the House, and Sally Kendall,[1] a policy staff person with the Democratic caucus. Respondent also commented to Ms. Kendall that, because of her own disability, she anticipated work challenges with Complainant.

16. One day during session, Complainant worked 13 hours and met with Respondent at the end of the day. During that meeting, Respondent told him that he did not have the capabilities to do the job and that they were a poor fit because of their personalities. Complainant thought he was going to be fired and started crying. Complainant also thought that by "personalities" she was again invoking his disability and regarding him as disabled.

17. On one of his final days before resigning, Respondent told Complainant something like, "Well, we knew this was going to be a hard relationship [implying the challenges between my disability and her disability] and most likely wouldn't work out. But, you tried hard." He said he found that comment disrespectful.

18. Until the June meeting with the Supervisor of LAs just before he resigned, Complainant did not tell her or anyone in the administration that he consistently felt demeaned and intimidated by Respondent. He said he did not report his distress because he had no confidence that anyone would do anything to help him other than tell him that he needed to adapt his work practices to meet Respondent's expectations.

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Special Privileges

RCW 42.52.070 provides as follows:

> *(1) Except as required to perform duties within the scope of employment, no state officer or state employee may use his or her position to secure special privileges or exemptions for himself or herself, or his or her spouse, child, parents, or other persons.*

[1] This witness has been given a fictitious name.

(2) For purposes of this section, and only as applied to legislators and employees of the legislative branch, "special privileges" includes, but is not limited to, engaging in behavior that constitutes harassment. As used in this section:

(a) "Harassment" means engaging in physical, verbal, visual, or psychological conduct that:

(i) Has the purpose or effect of interfering with the person's work performance;

(ii) Creates a hostile, intimidating, or offensive work environment; or

(iii) Constitutes sexual harassment.

(b) "Sexual harassment" means unwelcome or unwanted sexual advances, requests for sexual or romantic favors, sexually motivated bullying, or other verbal, visual, physical, or psychological conduct or communication of a sexual or romantic nature, when:

(i) Submission to the conduct or communication is either explicitly or implicitly a term or condition of current or future employment;

(ii) Submission to or rejection of the conduct or communication is used as the basis of an employment decision affecting the person; or

(iii) The conduct or communication unreasonably interferes with the person's job performance or creates a work environment that is hostile, intimidating, or offensive.
(emphasis added)

1. Application of ESHB 2018

Subsection (2) of RCW 42.52.070 was added by the legislature (ESHB 2018) during the 2019 legislative session. ESHB 2018 became effective on July 27, 2019. The actions Complainant alleges violated RCW 42.52.070 occurred before the effective date of the bill. The question is then whether the provisions of ESHB 2018 can be applied retroactively.

The general rule is that, absent contrary legislative intent, statutes are presumed to operate prospectively only. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264 (2012). However, a statute will be deemed to apply retroactively if it is remedial in nature and retroactive application would further its remedial purpose. *Bayless v. Community College Dist. No. XIX*, 84 Wn. App. 309 (1996). A statute is remedial if it relates to "practice, procedure or remedies, and does not affect a substantive or vested right."[2] *Id.* at 312. Remedial statutes generally "afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries." *Haddenham v. State*, 87 Wn.2d 145 (1976). A statute is not remedial when it creates a new right of action. *Loeffelholz*, 175 Wn.2d at 271. Furthermore, use of the present and future tenses in a bill manifests an intent that the act should apply prospectively only. *Johnston v. Benefit Management Corp.*, 85 Wn.2d 637 (1975).

ESHB 2018 applies prospectively for the following reasons: 1) there is no specific language in the bill indicating the legislature intended to apply the bill retroactively; 2) RCW 42.52.070(2) is not a remedial statute because it does not afford a remedy or forward remedies already existing for the redress of injuries; instead, it, in effect, creates a new right of action; and 3) the language of the bill is written in the present tense. To apply the provisions of ESHB 2018 retroactively could result in holding Respondent responsible for actions that were not a violation of the special privileges section of the Act at the time the action complained of occurred (see discussion in next section of this opinion) and to do so now would

[2] A retroactive amendment does not infringe a vested right merely because it disappoints expectations. On the contrary, a vested right involves more than a mere expectation and requires an actual title, legal or equitable, to the present or future enjoyment of the property. *SEIU 925 v. Dept. of Early Learning*, 2019 Wash. LEXIS 666.

"violate the core tenet of retroactivity jurisprudence that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Loeffelholz*, 175 Wn.2d at 272.

2. Analysis of RCW 42.52.070 (prior to ESHB 2018)

RCW 42.52.070 is violated when a legislator uses his or her position to secure special privileges or exemptions for himself or herself, or his or her spouse, child, parents, or other persons. This statute is not violated if the actions complained of are a proper use of the legislator's discretionary authority within the scope of his or her legislative employment. *In re Hankins*, 2007 – No. 1B; *In re Eickmeyer*, 2006 – No. 1.

The following are a sample of opinions analyzing the "special privileges" statute (prior to ESHB 2018) that have been issued by the Legislative Ethics Board:

Opinions in Which Violations Found: *Advisory Opinion* 1995 – No. 1 (violation found when legislator sent letter to other attorneys in his office regarding his legislative leave of absence and letter could be construed to offer special privileges to attorneys and clients); *Advisory Opinion* 1995 – No. 17 (violation found when legislator used position to solicit lobbyists); *In re van Luven*, 2001 – No. 4 (violation to solicit tickets to a sporting event); *In re Schmidt*, 2006 – No. 4 (violation found when legislator used position to advocate for a friend who was involved in a dispute with another party; and *In re Hankins*, 2007 No. 1B (violation found when legislator used position to promote family business and tried to intimidate agency staff through persistent and threatening actions perceived as supportive of the family business).

Opinions in Which No Violation Found: *In re Mielke & Pennington*, 1999 – Nos. 1 & 2 (facilitating two meetings for local pool committee with state employees not a violation); *In re Eickmeyer*, 2006 – No. 1 & *In re Kretz*, 2017 – No. 42 (perceived threatening remarks not considered a violation); and *In re Armstrong*, 2011 – No. 1 (no violation when legislator is not a hired lobbyist for employer and his support and advocacy of three bills did not confer special privileges on employer).

In none of the opinions discussed above was the alleged harassment of a staff person addressed. It was not until the Board's opinion in *In re Sawyer*, 2018 – No. 4, that the question of harassment of staff was presented directly to the Board. In that opinion, the Board declined to find that the harassment of staff by a legislator violated the special privileges section of the Act (as it existed prior to the passage of ESHB 2018). It did, however, suggest that if the legislature wanted to define "special privileges" to include harassment it should do so. The legislature did just that in passing ESHB 2018. However, as stated in V.A.1. of this opinion, that bill does not apply retroactively to address the issues presented in this complaint.

While Complainant may have felt demeaned and belittled by Respondent's treatment of him, Respondent's methods of supervision and correction, while sometimes harsh, were nevertheless a proper use of her discretionary authority within the scope of her legislative employment. As a result, there is no violation of RCW 42.52.070 (prior to ESHB 2018).

B. RCW 42.52.160 – Use of State Resources - Private Gain

RCW 42.52.160 generally prohibits state officers or state employees from employing or using any person[3], money or property under his or her official control for personal gain. An exception to this general rule exists when the use of state resources is incidental, infrequent, involves *de minimis* or no cost to the state, does not interfere with the performance of official duties[4] and is reasonable in light of legitimate needs and expectations of the public workforce. *In re Oien*, 2001 – No. 1; LEB Rule 3. Legislative assistants are considered public resources. *In re Green*, 2005 – No. 7.

Generally, when the Board has found violations of RCW 42.52.160, it has been for very specific actions. *See, e.g., In re Buckallew*, 1998 – No. 2 (use of copy machine by employee to duplicate private documents a violation); *In re de Bolt*, 2003 – No. 1 (use of state resources to prepare and mail personal letter); *In re Green*, 2005 – No. 7 (not part of legislator's duties to use public resources to become involved in private dispute); *In re Engelhardt*, 2005 – No. 2 (use of state supplied envelope to mail payment to home-owner's association a violation); *In re Higginbotham*, 2005 – No. 1 (use of computer to conduct private business a violation); *In re Eickmeyer*. 2006 – No. 12 (use of LA to place phone calls at state expense and prepare correspondence both related to outside employment considered a violation); *In re Fagan*, 2015 – No. 1 (use of LA and other House personnel to submit and process travel reimbursement claims a violation).

In the cases in which the Board has found a violation of .160, the actions complained of have resulted in a personal gain to either the respondent, a constituent of the respondent's or a family member of the respondent's. Such is not the case in this matter. While the Respondent's office management expectations may be excessive and overly burdensome, it would be difficult to say she imposed these expectations for personal gain. Based upon the facts, the Board believes Respondent felt these duties necessary in order to effectively perform her job as a legislator. Furthermore, whether her requirements were overly burdensome was a management issue for the House administration which they were addressing with Respondent. As a result, there is no violation of RCW 42.52.160.

C. RCW 42.52.050 – Confidential Information

RCW 42.52.050 provides in pertinent part as follows:

> *...(3) No state officer or state employee may disclose confidential information to any person not entitled or authorized to receive the information.*

"Confidential information" is defined as (a) specific information, rather than generalized knowledge, that is not available to the general public on request or (b) information made confidential by law. RCW 42.52.010(5).

[3] "Person" is defined as "any individual, partnership, association, corporation, firm, institution, or other entity, whether or not operated for profit." RCW 42.52.010(14).
[4] "Official duties" are defined as "those duties within the specific scope of employment of the state officer or state employee as defined by the officer's or employee's agency . . ." RCW 42.54.010(12).

Under the Americans with Disability Act (ADA), 42 USC §§ 12101 *et seq.*, employers must keep all information concerning an employee's medical condition confidential. This requirement includes medical information that an individual voluntarily discloses to his/her employer. An exception to this prohibition applies to supervisors and managers who can be told about necessary restrictions on the work or duties of the employee and about necessary accommodations. 42 USC § 12112.

Under House policy, members are considered supervisors of their LAs. In this capacity, Respondent did not violate the ADA in discussing Respondent's condition with Mr. Dean, who, as Chief Clerk of the House, leads the administration of that chamber, or with the House LA Supervisor. It did, however, violate the ADA when Respondent disclosed Complainant's medical condition to Ms. Kendall.

Complainant's disability is considered confidential information under the Act because it is information made confidential by law – the ADA. Respondent's disclosure of that information to persons not authorized or entitled to receive that information constitutes a violation of RCW 42.52.050(3).

The Board is troubled by the ease with which House staff appeared to share the fact of Complainant's disability with others. The Board urges House administration to better train its staff and legislators to ensure that all supervisors have adequate training in the proper handling of disability issues in the workplace.

VI. ORDER

IT IS ORDERED that reasonable cause does not exist to find a violation of either RCW 42.52.070 or RCW 42.52.160 and those allegations are hereby dismissed.

IT IS FURTHER ORDERED that reasonable cause does exist to find that Respondent violated RCW 42.52.050; however, the Board retains the discretion to dismiss an ethics complaint when it finds, after consideration of all the circumstances, that further proceedings would not serve the purposes of this chapter. These allegations are hereby dismissed.

Eugene Green

Eugene Green, Chair

2-7-2020

Date